IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: October 20, 2006
Decided: January 31, 2007
Corrected: February 2, 2007
(To insert correct footnote number 8)

STATE OF DELAWARE	)	
v.	)	ID# 0410023811
LAMAR O. COMER,	)	
Defendant.	)	

MEMORANDUM OPINION and ORDER

Upon Defendant's Renewed Motion to Dismiss and Defendants Renewed Motion for Judgment of Acquittal - DENIED

This criminal case started with three defendants, Clifford Reeves, Derrick Williams and Lamar Comer, on trial for first degree murder. Two defendants, Williams and Reeves, were acquitted of murder, while the third defendant, Comer, was convicted of murder in the first degree (felony murder). This is Lamar Comer's Motion for Judgment of Acquittal and Renewed Motion to Dismiss.

I.

On October 25, 2004, Bakeem Mitchell, an innocent bystander, died tragically. As he was coming out of a corner store at 5th and Madison Streets in Wilmington, Delaware, he was hit by a stray bullet. Although the facts and testimony were in dispute, some trial evidence put three defendants shooting at a moving car driven by Frank Johnson near 6th and Monroe Streets. One witness, though, saw only Comer on 5th Street, where Mitchell was murdered. The evidence also suggested that Johnson was from a nearby "turf," and there may have been a history between him and the trio. In any event, Mitchell was killed by a ricochet.

The State's theory was that, although all three defendants initially ran after Johnson's car, firing at it, Comer was the only person firing on 5th Street, where Mitchell was killed. The State also presented evidence that no gunfire came from Johnson's car. Even though the State did not argue it directly, the State implied that the only person who could have killed Mitchell was Comer.

Comer's theory was that the testimony was too inconsistent to harmonize and the jury could not possibly determine who was shooting. Comer also argued that Johnson was the only person firing a gun, and since Johnson's testimony was so

inconsistent, Johnson could not be believed. Comer never admitted that he was even near the crime scene during the shooting.

During discovery, the State turned over witness statements, including Shaquan McCoy's statement that she saw the murder committed by two men with goatees. The State, however, redacted portions of her statement. On April 20, 2006, defense counsel learned that McCoy also told the police that two men, "Unique" and "Tier," had a "beef" with Mitchell, the victim. McCoy thought the "beef" was over drugs and territory, and these men were possibly armed. On April 24, 2006, both Comer and Williams requested a continuance based on this disclosure, to provide time to find "Unique" and "Tier."

On May 3, 2006, calling the delayed disclosure a *Brady*[1] violation, Comer filed a Motion to Dismiss. On May 5, 2006, the court denied the motion without prejudice, but ordered the State to assist in locating these individuals. The State tried but was unable to provide any information on these two men's whereabouts.

Trial began on May 8, 2006. On May 24, 2006, as mentioned, the jury found Comer guilty of murder in the first degree (felony murder), possession of a firearm during the commission of a felony, and related charges. On June 2, 2006,

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Comer filed this Renewed Motion to Dismiss for the alleged *Brady* violation. Also, on June 8, 2006, Comer filed a Motion for Judgment of Acquittal on murder in the first degree and possession of a firearm during the commission of a felony. Those motions are at issue here.

II.

Superior Court Criminal Rule 29[2] governs Motions for Judgment of Acquittal. The court will grant Defendant's motion "if the evidence is insufficient to sustain a conviction of such offense or offenses."[3] "The standard of review in assessing an insufficiency of evidence claim is 'whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt.'"[4]

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[2] (a) The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

[3] Super. Ct. Crim. R. 29(a).

[4] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (quoting *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991)).

A.

Even though the eyewitness testimony is inconsistent, the jury could easily have harmonized the evidence and accepted the State's argument that Comer was shooting at Johnson when Mitchell died. The State offered sufficient evidence showing only Comer was shooting at Johnson when Mitchell was killed. The jury heard Shai Douglas testify that she was sitting on 5th Street, east of Madison, when the shooting happened. Although other witnesses saw all three defendants running and shooting at Johnson's car moments earlier, Douglas saw the car on 5th Street, where the victim was shot. On 5th Street, Douglas saw only Comer running and shooting after the car. She did not place the other two defendants on 5th Street. Thus, Douglas's testimony distinguished between Comer's and the other defendants' conduct.

Further, Johnson testified that he was alone in the car and did not fire any weapon during the incident. Corroborating Johnson's testimony, Elijah Word, Stephon Johnson and Roderick Rivers all testified that only one person was in the car and no gunfire came from Johnson's car. The jury apparently believed the State's witnesses, and it probably concluded that Comer fired the fatal shot. Viewing the evidence, both direct and circumstantial, in a light most favorable to the State, there was enough evidence to sustain the verdict.

B.

Also in his Motion for Judgment of Acquittal, Comer argues that he is entitled to judgment as a matter of law on his felony murder conviction. Although it is unclear, it appears that Comer is arguing that Johnson was the only shooter, and therefore, Johnson fired the fatal shot. If Johnson were the shooter, then Comer could not be held liable for felony murder as Johnson was an adversary, not an accomplice and not acting to further Comer's felony. Comer relies on the "agency theory of homicide," citing *Weick v. State*[5] for the proposition that "the State may not prosecute a defendant under the statutory felony murder rule for the death of a cohort caused by the victim of the felony." Comer also relies on *State v. Branson*, a Minnesota case, holding the felony murder rule does not apply when the victim was killed by a rival gang member, even though defendant was a participant in a gun battle.[6] In other words, Comer is apparently arguing that Johnson was the only one shooting, and since Johnson was not Comer's accomplice nor furthering Comer's felony, then Comer cannot be convicted of felony murder.

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[5] 420 A.2d 159, 162-63 (Del. 1980).

[6] 487 N.W.2d 880 (Minn. 1992).

Weick requires that "the killing be performed by the felon, his accomplices, or one associated with the felon in his unlawful enterprise."[7] *Weick* considered this limitation necessary because the felony murder statute requires the killing be "in furtherance" of a felony.[8] Put differently, if the killing is done by another person not associated with the felon and not furthering the felony, then the felon cannot be convicted of felony murder.

To the extent that Comer is arguing that Johnson was the shooter, this was properly rejected by the jury. Although there was conflicting testimony, the court must look at the evidence in the light most favorable to the State. And, the State offered evidence showing that only Comer was shooting on 5th Street and Johnson was not firing a weapon at all. As mentioned above, at least four witnesses testified that no gunfire came from the car, but instead other testimony places Comer firing a weapon near the murder scene. Comer's firing a gun was in furtherance of his felony, attempted assault of Johnson. Therefore, a rational trier of fact, viewing the evidence in the light most favorable to the State, could find that Comer was a

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[7] 420 A.2d at 162.

[8] *Id.* Effective May 2004, the felony murder statute, 11 *Del. C.* § 636, was amended to eliminate the requirement that the killing be "in furtherance." *See Hassan-El v. State*, 911 A.2d 385, 390 (Del. 2006). Although the amended statute was effective at the time of the shooting, the State did not argue this point, and the outcome is the same either way.

shooter, his shooting was in furtherance of his felony, and it caused Mitchell's death. *Weick*, therefore, does not apply.

C.

In his Motion for Judgment of Acquittal, Comer's final argument is that the "jury instruction misstated the law when it stated that the 'State need not prove that a particular shot, fired by a particular person caused the death.'" Instead, Comer believes that "the State had to prove that Defendant Comer or a co-conspirator of Comer fired the fatal shot."

The jury instruction that Comer disagrees with reads:

> A Defendant causes the death of another person when the Defendant's voluntary act brings about that person's death, which would not have happened but for the Defendant's act. If it is demonstrated beyond a reasonable doubt that a Defendant recklessly fired shots along with others and a person's death was caused by one of those shots, or if it is proved beyond a reasonable doubt that Defendant recklessly participated in an exchange of gunfire that caused a person's death, then the State need not prove that a particular shot, fired by a particular person caused the death.

Comer misreads the instruction. The only way that the jury could have found Comer guilty was if it found that Comer, Reeves or Williams was shooting, or Comer and Johnson were exchanging shots. The instruction states that Comer could only be found guilty if "a Defendant [i.e. Comer, Reeves or Williams]

recklessly fired shots along with others [i.e. Johnson or anyone else]" or "Defendant recklessly participated in an exchange of gunfire." If only Johnson were shooting, the instruction charged the jury to find Comer not guilty of felony murder, as common sense also dictates. Especially in light of the verdict for Reeves and Williams, the jury concluded that Comer was a shooter, which is the way the evidence pointed. It is unreasonable to assume that the jury misread the instruction and found Reeves and Williams not guilty, yet it found Comer guilty of murder for a shooting by Johnson, in which Comer played no role.

III.

In his Motion to Dismiss, Comer argues an alleged *Brady* violation occurred when the State failed to disclose to defense counsel potentially exculpatory portions of Shaquan McCoy's statement. As mentioned above, these redacted portions related to a "beef" between Mitchell and "Unique" and "Tier." Comer argues that this is potentially exculpatory, as there may have been others, "Unique" and "Tier," with a motive to shoot the victim. Also, he argues that he was prejudiced by the delay, as he could not locate the pair only days before trial.

According to *Starling v. State:*

> There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is

> suppressed by the State; and (3) its suppression prejudices the defendant.

The State agrees that its delayed disclosure violates Starling's second prong. Under the first prong, however, Defendant fails to show that the information was exculpatory or impeaching. Here, two men, "Unique" and "Tier," merely had a "beef" with Mitchell, the victim. No other evidence linked them to the murder. Even McCoy, who identified the quarrel and witnessed the murder, never said that she saw the men at the crime scene. Also, the evidence clearly showed that Mitchell was killed by a ricochet and, therefore, was probably not an intended victim.

Under the third prong, the duty to disclose only arises if the evidence is material to defendant's guilt or punishment.[9] Evidence is considered material for *Brady* purposes if it shows that someone else may have committed the offense[10] or had an equally valid motive to commit the murder.[11] Usually, "*Brady* requires the prosecution to produce evidence that someone else may have committed the crime."[12] For example, *Brady* violations have occurred when the State did not turn over

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[9] *Stokes v. State*, 402 A.2d 376, 378 (Del. 1978) (quoting *Brady*, 373 U.S. at 87).

[10] *Brady,* 373 U.S. at 86. *See also People v. Beaman*, 2006 WL 3234234, at *9-10 (Ill. App. Ct.); *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984); *Sellers v. Estelle*, 651 F.2d 1074, 1075-77 (5th Cir. 1981).

[11] *Mendez v. Artuz*, 2000 WL 722613, at *13 (S.D.N.Y).

[12] *Jarrell*, 735 F.2d at 1258. *See also Sellers*, 651 F.2d at 1075-77; *People v. Whalen*, 634 N.E.2d 725, 733 (Ill. 1994).

information that a witness told the police that another person was the killer,[13] that the victim was killed because he ripped off a mob boss,[14] or that another person admitted to the crime.[15] In these instances, the police had concrete information about another suspect, and the State should have disclosed it.

There are instances, however, where a *Brady* violation did not occur when evidence of other "suspects" was not turned over to the defendant. *Jarrell v. Balkcom* found no *Brady* violation after the State failed to disclose a list of "possible" suspects where the police had hundreds of names.[16] Although the police talked to some of these "possible suspects," none of these people were considered real suspects or became the focus of the investigation.[17] Similarly, in *People v. Beaman*, no *Brady* violation occurred when the State failed to turn over evidence that the victim's boyfriend had a history of domestic violence, drug use, etc.[18] The court

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[13] *People v. Lumpkins*, 533 N.Y.S.2d 792, 795-99 (N.Y. App. Div. 1988) ("There was 'substantial basis' for Detective Stubbs 'to believe that the undisclosed witness could provide material testimony favorable to the defendant.'") (citing *People v. Alongi*, 131 A.D.2d 767, 768-769 (N.Y. App. Div. 1987)).

[14] *Bowen v. Maynard*, 799 F.2d 593, 600-01 (10th Cir. 1986).

[15] *Sellers*, 651 F.2d at 1075-77.

[16] *Jarrell*, 735 F.2d at 1258.

[17] *Id*.

[18] *Beaman*, 2006 WL 3234234, at *9-10.

stated that "such evidence is properly excluded if it is too remote or speculative."[19] The boyfriend's information was too remote and speculative to connect him to the murder, and the State did not have other evidence to make him a suspect.[20]

The distinction is whether the people were truly suspects. If the person admitted to the crime or had a serious connection to the murder, then *Brady* requires that the information be turned over.[21] Where, however, the information or suspect is too remote, too speculative, or the person is not considered a real suspect, then the prosecution does not have to turn over that information under *Brady*.[22] When, however, there is concrete evidence or information linking that suspect to the crime, the prosecution must turn over that information or a *Brady* violation occurs.

Here, the information about "Unique" and "Tier" is too remote and speculative. No other evidence, including all eyewitness testimony, indicated that these two were at the crime scene, and the police did not consider them real suspects. And again, Mitchell was killed by a ricochet. Failing to disclose this statement

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[19] *Beaman*, 2006 WL 3234234, at *9-10 (citing *People v. Whalen*, 634 N.E.2d 725, 733 (Ill. 1994)).

[20] *Beaman*, 2006 WL 3234234, at *9-10.

[21] *Lumpkins*, 533 N.Y.S.2d at 795-99; *Bowen*, 799 F.2d at 600-01; *Sellers*, 651 F.2d at 1075-77.

[22] *Jarrell*, 735 F.2d at 1258; *Beaman*, 2006 WL 3234234, at *9-10.

sooner had no bearing on the verdict, and it does not undermine confidence in the trial's outcome.[23] Therefore, no *Brady* violation occurred.

In closing, as to the *Brady* issue, the court further observes that the defense knew about McCoy well before trial. She could have been interviewed. Moreover, several months have passed since trial, and Comer's counsel apparently have not located "Unique" and "Tier," much less attempted to interview them. Therefore, at this point, Defendant's *Brady* argument seems theoretical at best.

IV.

For the foregoing reasons, Defendant's motions to dismiss and for acquittal are **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

oc: Prothonotary (Criminal Division)
pc: Martin J. O'Connor, Deputy Attorney General
James J. Kriner, Deputy Attorney General
J. Kate M. Aaronson, Esquire
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[23] *See, e.g., Starling*, 882 A.2d at 756.